2642

IN THE

Circuit Court of Appeals

OF THE

UNITED STATES

Ninth Judicial Circuit

NORTHERN PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

EMMA A. WISMER, substituted for GEORGE F. WISMER, deceased,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Defendant in Error

FRANCIS A. GARRECHT,
United States Attorney,
Eastern District of Washington.

SHAW & BORDEN CO. 155568

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THE ISSUE.

If the evidence establishes the facts hereinafter stated, the legal conclusion follows that the lands and premises described in the complaint, on October 4, 1880, the date of the filing of the map of definite location, as well as all odd numbered sections in the Spokane Indian Reservation, were not public lands within the meaning of the granting Act of July 2, 1864 (13 Stats. L. 365); but that the same had been reserved, appropriated and set aside for the Indians and were occupied by them as their reservation and

were subject to their claims and rights and no title or interest therein whatsoever passed to the Northern Pacific Railroad Company.

FACTS ESTABLISHED.

On August 16, 1877, all the unsurveyed territory now comprising Eastern Washington was Indian country and the lands within the boundaries of what was thereafter designated as the Spokane Indian Reservation in the State of Washington, and in which the lands described in the complaint herein were embraced, were occupied, used, enjoyed and claimed by the Indians, and they had never ceded any part thereof or any interest therein to the Government of the United States, and that during all of said time none of the rights and claims of said Indians in and to the said lands and premises had been extinguished. (Transcript of Record pp. 54-55).

These roving bands of uncontrolled Indians, especially those on the Columbia River, were a source of annoyance and danger, and Colonel E. C. Watkins, United States Indian Inspector, was, on May 7, 1877, directed by the Commissioner of Indian Affairs to gather these Indians upon permanent Reservations; and, further, that he should give them distinctly to understand that their absence from reservations would no longer be permitted. In order to accomplish the desired result, said Inspector was directed to cooperate with General Howard. (Transcript p. 69).

In the month of June, 1877, certain Indian bands

and tribes of the Northwest country had begun hostilities upon, and had committed depredations against white settlers in the Indian Country in Eastern Washington and Oregon and Northern Idaho, and for a long time thereafter continued to menace the white population living in said territory. That said Indians who had gone upon the warpath sought to induce others of their race who were engaged in peaceful pursuits to join in these wars, hostilities and depredations. That among the peaceful Indians, which those at war were endeavoring to have join them, were many residing on the lands afterwards set aside as the Spokane Indian Reservation. (Transcript p. 55).

In pursuance of the directions of the Commissioner of Indian Affairs, and upon August 16th, 17th and 18th, 1877, a council was held at Spokane Falls, Washington, between the Spokane Tribe of Indians, Colonel E. C. Watkins, who was then and there an Indian Inspector representing the Department of the Interior acting in his official capacity; General Frank Wheaton and Captain M. C. Wilkinson, of the United States Army, representing the War Department, and General Howard. (T. p. 70).

At said council, said Inspector Watkins made the following statements and representations to said Indians:

"We want to find out the feeling of the Indians here towards the whites. Some Indians have been roaming over the country. The policy of the Government is to place Indians on reservations. * * *"

"The Commissioner of Indian Affairs, Secretary of the Interior, President of the United States, have all decided that it is best for all Indians to go upon reservations. The President of the United States gives the Indians more land than he does the white man. The reserve proposed for the Spokanes gives to each Indian more land." (T. p. 70).

Colonel Watkins then described to the said Indians the proposed reservation which the Indians later agreed to accept and in relation thereto further said: "If I did not think it was a good reserve in every particular, I would not urge it upon you." (T. p. 71).

Thereupon, in order to carry out the instructions of the Executive Department of the Government, as a means of influencing said Indians to continue in friendly relations with the whites, and to remain at peace with the United States and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder; and for the purpose of collecting the said Indians belonging to the said tribe on a reservation, thereto engage in agricultural pursuits and establish permanent homes, and to extinguish the general Indian title of said Indians to all other lands not within the said reservation, the following agreement was entered into:

IN COUNCIL AT SPOKANE FALLS, W. T.
August 18th, 1877.

We, the undersigned Chiefs and head men of the Spokane Tribe of Indians for ourselves and our people hereby agree to accept the following described lands for our reservation: Beginning at the source of the Chimokan Creek in Washington Territory, thence down said creek

to the Spokane River, thence down said River to the Columbia River, thence up the Columbia River to the mouth of Nimchin Creek, thence easterly to the place of beginning.

And we do further agree to go upon the same by the first of November next with the view of establishing our permanent homes thereon and engaging in agricultural pursuits. We hereby renew our friendly relations with the whites and promise to remain at peace with the Government and abide by all laws of the same, and obey the orders of the Indian Bureau and the officers acting thereunder.

Names of Witnesses:
E. C. Watkins,
U. S. Indian Inspector.

Names:

Whistle-poo-Sum	his X mark	Spokane
Quis-e-me-ow	his X mark	Spokane
Ah-mi-melechin	his X mark	Spokane
Cos-to-akan	his X mark	Spokane
Ora-pa-han	his X mark	Spokane

Paul his X mark Ora-pa-han

Frank Wheaton,
Bt. Major Gen. U. S. Army,
Col. 2d Infantry.
M. C. Wilkinson,
Bvt. Capt. U. S. Army,
Aide de Camp.
(Transcript p. 74, p. 56).

In pursuance of said agreement, the Indians already on said lands agreed to remain thereon, and others not so located agreed to go upon said lands, which it was agreed should be a Reservation for such Indians.

Thereafter, and prior to November 14, 1877, and pursuant to the agreement aforesaid, the said E. C. Watkins, Indian Inspector as aforesaid, acting in his official capacity, located such of the said Spokane Indians as were not already resident thereon upon said Reservation above described, and said Spokane Indians remained upon and continued in use, occupancy, possession and enjoyment of said tract described in said agreement and claimed the same as their reservation continuously thereafter until the year 1910, when the same was opened to settlement by Act of Congress and the Proclamation of the President. (T. pp. 57, 66, 67).

The action of the said E. C. Watkins in locating said Indians upon said reservation was by him reported to the Commissioner of Indian Affairs on November 14, 1877, and said report was, on January 23rd, 1878, in response to a resolution, communicated by the Secretary of the Interior to the United States Senate, and by the Senate referred to the Committee on Indian Affairs and ordered printed. (T. pp. 58, 85, 86).

In November, 1877, said Indians went upon said lands in compliance with said agreement and at all times thereafter claimed the same as their Reservation, and were expecting and relying upon the issuance

of the Executive order which was made in January, 1881. (T. pp. 64, 65, 66, 67).

Said Indians, after November 14, 1877, and long prior to October 4, 1880, established permanent homes on said Reservation and many of them fenced their lands, engaged in agricultural pursuits, and made valuable improvements. (T. pp. 66, 67, 92, 93).

About August, 1880, said Indians were much disturbed by the attempts of squatters to locate on land within the limits of said territory so claimed by them as their reservation, and on the 3d day of September, 1880, for the purpose of carrying out the terms of the agreement entered into at said council and preserving peace between the Indians and white settlers, Brigadier General Howard, of the Department of the Columbia, with the approval of the Secretary of War and the Secretary of the Interior, made an order directing that the land above described be protected against settlement by others than said Indians, until a survey could be made or until further instructions were received, which order was as follows:

MILITARY ORDER

HEADQ'RS. DEPT. OF THE COLUMBIA

IN THE FIELD SPOKANE FALLS, W. T.

September 3, 1880

FIELD ORDER No. 8

Whereas, in consequence of a promise made in August, 1877, by E. C. Watkins, Inspector of the Interior Department, to set apart, or have set apart, for the use of the Spokane Indians

the following described territory, to-wit: Commencing at the mouth of Cham-a-kane Creek, thence north eight miles in direction of said creek, thence due west to the Columbia River, thence along the Columbia and Spokane Rivers to the point of beginning—the Indians are still expecting the Executive Order in their case and are much disturbed by the attempts of squatters to locate land within said limits, it is hereby directed that the above described territory, being still unsurveyed, be protected against settlements by other than said Indians until the survey shall be made, or until further instructions. This order is based upon plain necessity to preserve the peace until the pledge of the Government shall be fulfilled, or other arrangements accomplished.

The Commanding Officers of Forts Coeur d'Alene and Colville, and Camp Chelan are charged with the proper execution of this order.

By command of Brigadier General Howard,

H. H. PIERCE,
1st Lieut. 21st Infantry, Acting
Aide-de-Camp.

Official.

(T. pp. 58-59).

That said order was made by the authority of the War Department with the concurrence of the Department of the Interior, and with the approval of the Secretary of War and of the Secretary of the Interior. (T. pp. 79, 80, 81, 82).

That the lands so reserved, which included the lands described in the complaint, were so set apart in pursuance of the said agreement made between said Indians and the United States, acting by and through said E. C. Watkins, Indian Inspector as aforesaid,

for the exclusive use and occupancy of said Indians and for their care and protection.

That said agreement with the Indians, and the said order creating and setting aside said tract of land as a Reservation were not revoked, but were recognized and confirmed by the Secretary of War and the Secretary of the Interior, and approved and sanctioned by the President of the United States.

The formal order and proclamation thereof was made on January 18, 1881, and is as follows:

EXECUTIVE MANSION

January 18, 1881.

It is hereby ordered that the following tract of land situated in Washington Territory be, and the same is hereby set aside and reserved for the use and occupancy of the Spokane Indians, namely:

Commencing at a point where the Chemakane Creek crosses the forty-eighth parallel of latitude; thence down the East bank of said creek to where it enters the Spokane River; thence across said Spokane River westwardly along the southern bank thereof to a point where it enters the Columbia River; thence across the Columbia River northwardly along its western bank to a point where said river crosses the said forty-eighth parallel of latitude, thence East along said parallel to the place of beginning. (T. p. 59, 60, 79, 80, 81, 82).

The said Reservation was established in August, 1877, was claimed, used and occupied as such by said Indians at all times subsequent to November, 1877, and was set apart and protected against settle-

ment by other than said Indians from and after September 1, 1880.

Said matters were of public notoriety, were known to Congress, and the Executive Department of the Government; and the rights and claims of said Indians to said Reservation were continuously recognized and protected, and the lands reserved, apportioned and set apart for said Indians by the Government from a time long prior to October 4, 1880. (T. pp. 79, 80, 81, 82, 85, 86).

That the lands described in the complaint were a part of said Reservation which was actually set apart to said Indians and claimed by them as such continuously after August 18, 1877, and actually, uninterruptedly occupied, used and enjoyed by them as such from November 14, 1877, to and including the time of approval of said Act of May 29, 1908. (T. pp. 66, 67, 92, 93).

Under the Act of Congress approved May 29, 1908, (35 Stats. L., 458) and the proclamation of the order of the President of the United States of May 22, 1909, the said tract of land became subject to homestead entry, and on or about April 2, 1910, at the United States Land Office, in the City of Spokane, State of Washington, defendant made homestead entry upon the premises described in the complaint, which entry was duly accepted by the Register and Receiver of said Land Office.

On April 9, 1913, patent to said land was issued to this defendant, and by virtue of his said entry and the patent thereafter issued to him, defendant en-

tered into the possession of said premises on or about April 2, 1910, and ever since has continued to, and now does, occupy the same.

That prior to said homestead entry, the plaintiff asserted its claim herein before the General Land Office to the land described in the complaint, and other lands included within the Spokane Indian Reservation, basing its title thereto upon the grant made by the Act of July 2, 1864 (13 Stats. L., 365); but said claim was denied and on appeal decided by the Secretary of the Interior adversely to the contention of plaintiff herein.

That said decision was upon questions of mixed fact and law and was in words and figures following:

DEPARTMENT OF THE INTERIOR

926 WASHINGTON G. B. G.

Mar. 7, 1910.

Commissioner of the
General Land Office:

Sir:

This is the appeal of the Northern Pacific Railway Company from your office decision of February 15, 1910, denying the claim of said Company to 64,000 acres of land, falling within the place limits of the grant made to said Company by the Act of July 2, 1864 (13 Stat., 365) because of its inclusion within the Spokane Indian Reservation, and holding that said lands are subject to disposition under the Act of May 29, 1908 (35 Stat., 458).

It appears from your said office decision and it is not disputed that in August 1877, E. C. Watkins, an Indian Inspector of this Department,

had a conference with the Spokane Indians and set apart or promised to have set apart for their use a certain tract of land; That on November 26, 1877, said Inspector made a report to the Commissioner of Indian affairs relative to the consolidation of the Indians of Oregon and Washington Territory. In said report he refers to the Colville Indian Reservation, in which the Spokane Indians belonged, and states that he located the Spokane and Palouse Indians North of the Spokane River, giving them a tract about 20 miles square adjoining the Colville Reservation. This tract includes the land in question. In a report dated August 18, 1880, published in the Indian Office, Mr. John A. Sims, United States Indian Agent, Colville Agency, Washington, shows that the Spokane Indians, numbering 685, "are living along the Spokane River and vicinity from Spokane Falls to its junction with the Columbia," these being the same lands set apart for them by Inspector Watkins: and that the greater number of the Spokane Indians had farms upon which they raised most of their subsistence. On September 3, 1880, H. H. Pierce, First Lieutenant 21st Infantry, by command of Brigadier General Howard, proclaimed in special field order No. 8, Headquarters Department of the Columbia, in the field, Spokane Falls, Washington, a reservation for the Spokane Indians described the lands as given above in the agreement made by Inspector Watkins, and stated in said order that it was for the purpose of protecting the lands against settlement other than by said Indians, until the survey should be made, or until further instructions, and was based upon plain necessity to preserve the peace until the pledge of the Government should be fulfilled or other arrangements accomplished. The Executive order setting apart said Indian Reservation is dated January 18, 1881, and described the lands practically the same as in said order No. 8.

The definite location of the Northern Pacific Railway's line of road coterminous with and opposite the lands in question, was made October 4, 1880. It thus appears that the time at which the Railway Company's claim would ordinarily have attached to said lands they were included in the aforesaid reservation created by the said H. H. Pierce, September 3, 1880, but had not been included within the Executive order setting apart said Indian Reservation January 18, 1881.

Your office decision holds that negotiations of the said E. C. Watkins, the facts stated in said report of John A. Sims, United States Indian Agent, and the order of H. H. Pierce of September 3, 1880, constituted such reservation of this land as prevented the attachment of the railway grant upon definite location. This is complained of upon appeal, but no authorities are cited in support of the appeal, except the case of *Buttz v. Northern Pacific Railway Company,* 119 U. S., 55, which, it is contended, is authority for the contention of the Company that these lands had not been withdrawn prior to January 18, 1881, and that they were, therefore, subject to the Company's grant October 4, 1880. The case cited is not in point and furnishes no authority for the contention made.

The fact of the negotiations and of the military order above referred to is not denied upon the appeal, but the legal effect of these proceedings is disputed.

Upon a careful consideration of the subject, it is believed that these proceedings constitute such reservation of the land in questions as brought them within the excepting clause of the grant of July 2, 1864.

The decision appealed from is affirmed and your office will proceed to the disposition of these lands in accordance with the provisions of the Act of May 29, 1908, *supra.* (T. pp. 61, 62, 63, 64).

The Executive Department of the Government and the Congress of the United States, ever since November, 1877, have recognized the agreement signed by said Indians as initiating their valid claim to said reservation, and the same was, in pursuance thereof, set apart, reserved and appropriated for them by the President. (T. pp. 60, 85, 87, 88).

By virtue of the agreement, orders, acts and proclamations aforesaid, the said Indians in 1877 relinquished all their claims and rights in and to the other lands in Washington Territory and retired upon, and permanently established themselves upon, the said Spokane Indian Reservation, and thereby the Indian title to the other lands within the grant was extinguished and the predecessor in interest of the said plaintiff, with full knowledge of the facts, and well aware that the said Indians believed that the lands set apart and reserved for them comprised a valid Indian Reservation, and that relying thereon said Indians had relinquished all claims to other lands within said grant, and said predecessor of the plaintiff acquired the immediate occupation, use, enjoyment and title of lands within the grant so relinquished by said Indians which it otherwise would not have had. (T. pp. 66, 67, 52).

POINTS PRESENTED.

The Government is interested in this case for the reason, as appears in the record (T. p. 89), that Indians of the Spokane Tribe have been allotted lands in odd sections of what was the Spokane Indian

Reservation, and of which they will be deprived if the contention of the plaintiff should prevail.

The Government, therefore, contends:

I. That the odd sections of land in the Spokane Indian Reservation were not within the grant to the Railroad Company because they were not public lands in the full sense required to pass by the Act; but were excepted therefrom for the reasons:

a. They were subject to other "claims or rights."

b. They were "otherwise appropriated."

c. They were "reserved."

The Court below rested its decision upon the point that these lands were not public lands, which was sufficient.

But we insist that the plaintiff is here precluded from recovery on other grounds:

II. The question here involved is one of public policy, and, therefore, a political question not within the province of the judiciary.

III. The question here involved is one of mixed fact and law, which has been determined by the Interior Department, adversely to the plaintiff, and that decision will not be interferred with by the Courts.

IV. By the agreement and the retirement of the Indians to the Reservation in question in pursuance thereof, great benefit accrued to the Railroad Company, which it accepted, acted upon and has enjoyed to the detriment of the Indians; and the plaintiff corporation, by reason thereof, should be estopped from now asserting that said Indians acquired no rights in the premises.

AUTHORITIES CITED:

I. CONSTRUCTION OF THE ACT IN QUESTION:

In construing this Act the Supreme Court has repeatedly held:

That Congress intended that only such lands should pass to the Northern Pacific by the grant "as were public lands in the *fullest* sense of the term," and which were "at the time of definite location of its road free from all reservations and appropriations, and all rights and claims."

N. P. R. R. Co. v. Musser et al., 168 U. S., 608;
N. P. R. R. Co. v. Saunders, 166 U. S., 620;
Northern Lumber Co. v. O'Brien, 204 U. S., 200.

The Circuit Court of Appeals for this Circuit has also so held.

N. P. v. Maclay, 61 Fed., 555.
N. P. v. McCormick, 94 Fed. 940.

The language of the statute, and public policy as well, confined the grant to land which could be rightfully bestowed, "without disturbing existing relations and producing vexatious conflicts."

Leavenworth, Lawrence, etc., v. U. S., 92 U. S., 733.

No one can read the restrictive terms of the Act without being impressed with this fact.

The grant to the plaintiff was only of lands which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from

preemption, or other claims or rights at the time the line of said road is definitely filed."

Nelson vs. N. P. Ry. Co., 188 U. S., 108.
N. P. Ry. Co. vs. Trodick, 221 U. S., 208.

Affirming Circuit Court of Appeals, Ninth Circuit, in 164 Fed., 915.

The construction of the grant to be strict against the railroad company.

D. & Pac. R. R. Co. v. Litchfield, 64 U. S., 88.

The construction of the agreement to be liberal in favor of the Indians.

N. P. R. R. Co v. U. S., 227 U. S., 366.

All lands "otherwise appropriated," "reserved," or which were the subjects of "other claims or rights," are excepted from the grant. This language is broad and comprehensive and unless it is given technical and narrow interpretation it must unquestionably take these reservation lands out of the operation of the grant.

It is no longer open to dispute that the rights or claims of preemptioners or homestead settlers initiated prior to the definite location of the road will except lands from the grant.

A construction of the statute that would protect settlers and refuse the same application of it to lands appropriated for Indian occupation, would be more subtle than sound.

Leavenworth, Lawrence, etc. v. U. S., 92 U. S., 747.

RIGHTS AND CLAIMS OF THE INDIANS.

The execution of the treaty agreements and the action thereon by the Indians and by the Government officials prior to the filing of the map of definite location, created an inchoate title, the equities of which the Government was bound in good faith to maintain.

This incomplete title, coupled with the Indian occupancy as a reservation, was such a right and claim as excepted the reservation from the grant.

In this Act the words "claims" or "rights" are to be given a broad and liberal construction.

26. *A. & E.,* pp. 331-332.

But the demand of the Indians would come under the ordinary meaning of the word "claim" as defined by Webster's International Dictionary, which is:

> To ask by virtue of right, or *supposed right.*
> A demand of a right or *supposed right.*

As also under the definition of "claim" as given in the Universal Dictionary:

> To seek for, not as a right or as a due, but as *promised or* assured.

The policy of the government toward actual occupants of public land has been a liberal one, and a grant of public land will not be held to include lands in the actual occupancy and possession of an Indian tribe claiming them as a reservation by agreement with authorized officers of the Government.

26 *A. & E.,* 231-232.

"That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done has been done."

Leavenworth, etc., v. U. S., 92 U. S., 746.
Mo. Kan. & Texas v. Roberts, 152 U. S. 118.

The Indian agreement imposed upon the United States the obligation to fulfill its terms. It thus was the initiation of a right or claim.

In view of the reasoning and expressions of the Supreme Court in maintaining the rights and claims of settlers similarly situated from an equitable aspect, it would seem likely that the Court would hold that this special right or claim of the Indians would bring these lands within the intent of the exception to the grant to the railroad. Possession under an imperfect or equitable title should be respected and confirmed.

32 *Cyc.,* 1168.
Newhall vs. Sanger, 92 U. S., 761-765.
U. S. vs. So. Pac. R. Co., 76 Fed., 134-136.
U. S. vs. So. Pac. R. Co., 146 U. S., 570-606.

The obligation of the agreement commenced with its execution by the Indian Inspector and the subsequent ratification by the President related back to the date of signature. Under this rule, after the signing of an agreement of cession, the ceding power has no authority to make a grant of land or franchise within the territory ceded.

28 *A. & E.,* 478.
Gibson v. Chouteau, 80 U. S., 101.

THESE LANDS WERE "RESERVED" OR "OTHERWISE APPROPRIATED."

This Reservation was regularly established on August 18, 1877, by one of the recognized methods employed by the Executive Department of the Government.

> Indian Reservations are created and their boundaries defined in four different modes:
>
> First. By treaties, *conventions and agreements* with the various tribes.
>
> Transcript of Record pp. 67 and 68.

At the time of the filing of the map of definite location, October 4, 1880, the odd sections in the Spokane Indian Reservation were otherwise appropriated.

The word "appropriated" as defined in Vol. 1, p. 275, of the Universal Dictionary of the English language is:

> "To set aside part of what is one's own for a *special purpose.*"
>
> Also, in Webster's International Dictionary:
>
> "To set apart for, or assign to a particular person or use, in exclusion to all others."
>
> *Wilcox v. McConnell,* 38 U. S., 512.

About November, 1877, in pursuance of the agreement, the Indians went upon the lands and occupied the same continuously thereafter as their reservation, without objection by, or interference from, the Government.

Thereafter, the War Department, at the suggestion and request of the Secretary of the Interior, took active measures to prevent any intrusion upon said reservation until the executive order was made.

Such action by the Executive Department of the Government amounted to the withdrawal of said lands from the public domain, and such lands were no longer public lands in the fullest sense of the term so as to fall within the railroad grant.

U. S. v. Carpenter, 111 U. S., 347.
Spalding v. Chandler, 160 U. S., 394-404.
Mo. Kansas & Texas v. Roberts, 152 U. S., 118.

The action of the Department was a withdrawal.

The agreement and order of Inspector Watkins and General Howard took the Indian Reservation out of the public domain.

U. S. v. Carpenter, 111 U. S., 347.
Spaulding v. Chandler, 160 U. S., 394-404.

The action of the Commissioner of Indian Affairs is presumed to be the action of the President, and where the Commissioner ratifies and approves the action of an agent, either before or after it takes effect, his acts are valid and binding upon the Government.

22 Cyc. 142.

The Secretary of the Interior had charge of both land matters and Indian Affairs. This agreement of his duly authorized agent carried with it by necessary implication the duty to withdraw from the public domain the land necessary to carry it into effect; otherwise the purpose of the Indians and the Government could be defeated with the resultant outrage on the rights of the Indians.

Wolcott v. Des Moines Co., 72 U. S., 688.

Inspector Watkins was acting by the special direction of the Commissioner of Indian Affairs and General Howard on behalf of the Secretary of War, at the instance and request of the Secretary of the Interior, as these officials were acting in relation to a subject which appertained to their respective duties, their act, from the beginning, was in legal effect the act of the President.

32 *Cyc.*, 776.
Grisar v. McDowell, 73 U. S., 381.
Wolcott v. Des Moines Co., 72 U. S., 688.
Wolsey v. Chapman, 101 U. S., 768.

OMNIS RATIHABITIO RETROTRAHITUR ET MANDATO PRIOR AEQUIPARATUR.

:Brown, Max. 757.

Indian Inspector Watkins was authorized to make the agreement with the Indians. But even if he acted in excess of his authority it became binding by subsequent ratification and its validity related back to the time of execution to protect the Indians against any adverse claims which arose in the interim between its date and the confirmation.

Pickering v. Lomax, 145 U. S., 314-315.

A right once attaching to a particular tract, is as effective as a grant in segregating the land from the public domain. The tract cannot be otherwise disposed or by the Government unless the equity is subsequently lost, and on the grant passing, it relates back to the initiation of the right, cutting off all intervening claims.

26 *A. & E.,* 221.

Agreements in the nature of treaties are binding upon the contracting parties, unless otherwise provided in them, from the day they are signed.

U. S. v. Bridleman, 7 Fed., 902.
U. S. v. Martin, 14 Fed., 820.
Davies v. Police Jury, 50 U. S., 289.
22 *Cyc.,* 122.

II. A POLITICAL QUESTION.

The agreement with the Indians by Inspector Watkins, and the action thereon by General Howard, were made for reasons of public policy, in order to protect the Indians and to extinguish their general title to other public lands.

The determination of this very question of public policy was reserved in the granting act to the Rail-road Company. It was, therefore, a political question and not within the province of the judiciary.

8 *Cyc.,* 845.

After the Act of March 3, 1871, (Sec. 2079) formal treaties were no longer entered into with the Indians. Since then Indian affairs have been regulated by contracts with the Indian tribes, *practically amounting to treaties.*

16 *A. & E.,* 218.

Indian reservations are created by agreement with the various tribes.

Report 1878, p. LVIII.
32 *Cyc.,* 860.

Where the first incipient steps toward acquiring this reservation had been taken, it created an *inchoate*

title, which it was the duty of the Government to ratify and confirm. This involved some political act of authority and its exercise is not subject to review by the courts.

The political department alone must determine what construction the agreement with the Indians and the acts and representations of its officers shall receive and when the executive departments have asserted powers and rights under the instrument the judiciary cannot deny the construction.

28 *A. & E.,* 488.

The duty of protecting imperfect rights of property under agreements in the nature of treaties, such as the one in question, rests upon the political, and not the judicial, department of Government.

Courts are without jurisdiction to determine or protect such rights.

U. S. v. Sandoval, 167 U. S., 290.
U. S. v. Santa Fe, 165 U. S., 714.

Again,

Where Congress, by subsequent enactments and appropriations, has confirmed the claim of the Indians, its action is to be treated as an adjudication which is not subject to review by the Courts.

32 *Cyc.,* 1211.
Maxwell Land Case, 121 U. S., 366.

The action of the President in establishing the Reservation violated no contract between the Railroad Company and the Government. The Railroad Company at that time had not completed its road opposite

the lands in question, and in the Act of Congress expressly reserved power to "alter, amend or repeal."

U. S. v. Oregon, 176 U. S., 49.

The Act also provided that the right and title of the Indians should be extinguished. Whether the extinguishment of this Indian title was consistent with the welfare of the Indians could only be determined by Congress or the Executive Department.

A. P. R. R. v. Mingus, 165 U. S., 437.

III. DECISION OF THE LAND OFFICE FINAL.

In the officers of the Interior Department was vested the judgment and discretion of determining whether the lands applied for were public lands, or whether they were Indian lands, or whether, for any other reason, they were not free from right or claims, and the determination of this question, being one of fact, the decision will not be interferred with by the Courts.

32 *Cyc.* 1020, 1025.
26 *A. & E. Enc.,* 388.
Love v. Flahive, 205 U. S., 201.
Sullivan v. Damom, 202 Fed., 285.

Where a mixed question of law and fact is involved, the decision of the land department is conclusive:

26 *A. & E.,* 399.
32 *Cyc.,* 1022.
Marquez v. Frisbie, 101 U. S., 473.
Hartwell v. Havinghorst, 196 U. S., 635.
Whitcomb v. White, 214 U. S., 15.
Ross v. Day, 232 U. S., 117.
Logan v. Davis, 233 U. S., 623.

IV. ESTOPPEL.

The Northern Pacific Railroad Company, with actual or constructive knowledge of the facts, by its conduct led the Government and the Indians to believe that it acquisced in the agreement whereby the Indians should receive this reservation and abandon their Indian title to other lands claimed by the company under its grant.

After the Indians have gone upon the reservation in reliance upon the promise that it was set aside to them and the company has acquired title to the other lands in which the Indians, at the time of the agreement had perpetual right of occupancy, the corporation is estopped from now claiming, to the prejudice of the Indians, that the agreement was ineffectual to except the land from the grant to the Railroad Company.

16 *Cyc.* 792.

ARGUMENT.

It is notorious as an historical fact, as also abundantly appears from the record in this case, that great pressure had to be brought to bear upon these Indians to effect their removal to the reservation, and the agreement was evidently and purposely executed, not any more to secure to the Indians the rights for which they stipulated, as to effectuate the policy of the United States in regard to removing them to reservations and extinguishing their general right of occupancy to other lands.

By this agreement with Inspector Watkins, and their removal to the reservtaion in pursuance thereof, their Indian title of occupancy was extinguished in vast areas of lands in Eastern Washington, and thereby immediate title thereto was acquired by the railroad company on completion of its road.

After this corporation has for more than a quarter of a century enjoyed the benefits of the rights which the Indians yielded up under these agreements, it now would ask the Court to say that these Indians not only deprived themselves of the right of occupancy in the lands which they vacated, but by the same token dispossessed themselves of any right in the lands they were to receive as a reservation.

Such a decision would mean nothing less than that by the conduct and representations of the authorized officials of the Executive Departments of the Government, the Indians were buncoed into believing that they were being granted a reservation in which they and their children should be secure from encroachment, while in fact they were giving up their rights, but getting nothing.

The brutal logic of plaintiff's position that by reason of alleged technical defects these reservation lands are not excepted from the grant, if upheld, will, when the twenty-five year trust period has expired, deprive all these Indians who have taken allotments on the odd sections of their homes.

"We would hesitate to put the Government in that attitude. It rejects that attitude and accepts a greater responsibility."

The relations between the United States and the Indian Tribes, being those of a superior towards an inferior who is under its care and control, *its acts touching them and its promises to them, in the execution of its own policy and in the furtherance of its own interests,* are to be interpreted as justice and reason demand in cases where power is exerted by the strong over those to whom they owe care and protection.

From their very weakness and helplesssness, so largely due to the course of dealing of the Federal Government with them and these agreements wherein it has been promised: *"There arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by Congress, and by the Court, whenever the question has arisen."

> "The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules."

Choctaw Nation v. U. S., 119 U. S., 28.
U. S. v. Kagama, 118 U. S., 383.
N. P. Ry. Co. v. U. S., 227 U. S., 366.
U. S. v. Winans, 198 U. S., 372.
Jones v. Meehan, 175 U. S., 11.

THE CASE OF NORTHERN PACIFIC RAILWAY COMPANY VS. MITCHELL, 208 Federal, 469, OF NO AUTHORITY HERE.

It is surprising to find that plaintiff's XIIth Assignment of Error is to an expression found in the opinion of the District Court to the effect "that the

special claim of the Indians was not advanced or relied upon in the case of *Northern Pacific Railway Company v. Mitchell,* 208 Federa., 469." And also that so much space should be taken up in the brief in the discussion of that case.

Since the same learned Judge wrote the opinion in both cases, it ordinarily would be presumed that he understood the issues which each case presented for his decision. But, happily, his recollection of the matter is sustained by the very wording of the opinion in the Mitchell case (*supra*), which in its opening paragraph, contains the following definite statement of the issue:

> It is conceded that the plaintiff is the owner in fee of the land, and is entitled to recover unless the land was *reserved* when its predecessor in interest filed the map of definite location of its road, opposite this land, in the office of the Commissioner of the General Land Office, on the 4th day of October, 1880.

Admittedly, as the opinion of the Court here points out, but a single question was then presented for decision, i. e.: Was the Watkins' agreement, the Howard order, or the President's Proclamation, any one or all, singly or collectively, sufficient to create a Reservation antedating the filing of the map of definite location? "It was purely a question of a legal Reservation and in that case no sequence between the events resulting in the signing or issuing of the various documents was shown. The express direction to Inspector Watkins to act did not appear. The co-operation between the War Department and the De-

partment of the Interior with the knowledge of the President and Congress and their ratification of all these acts were not brought to the Court's attention. Indeed, the evidence so entirely failed to reveal this cooperation between the various Departments and the President that the Court in the Mitchell case was moved to suggest that the action of General Howard was "a plain encroachment on the prerogatives of another Department."

In these essentials the case now before the Court is very different and the connection between the Heads of the different Department working together to secure these lands as an Indian Reservation now clearly appears and if it were necessary to decide the case upon that point alone the Court would not follow the Mitchell decision but would be constrained to hold that the Proclamation of the President had relation back to the Watkins' Agreement which was made by the direction of the Commissioner of Indian Affairs, whose acts are in law presumed to be the acts of the President, thus antedating the filing of the map of definite location.

Nor does the lower Court anywhere suggest, as is more than once insinuated in appellant's brief, that it remained of the opinion "that these acts did not operate to reserve the lands." Indeed, to the contrary, and the opinion even went so far as to strongly intimate that the Government might set apart "as an Indian Reservation any lands to which the Indian title had not been extinguished, even after the map of definite location had been filed." (Tr. 38).

That this theory is not a mere idle fancy of the trial Judge is indicated by expressions found in the opinions of the Supreme Court, from only one of which we quote:

> The United States did not agree to extinguish the Indian title absolutely, but only 'as rapidly as may be consistent with public policy and the welfare of the Indian, and only by their voluntary session.' Whether an extinguishment of an Indian title at all was consistent with public policy and the welfare of the Indians can only be determined by Congress or the Executive officers of the Government; whether it could be obtained by voluntary session can only be determined by the acts of the Indians themselves. * * * The Railroad Company took its chances with the Government in this particular. The later might not deem it sound policy or for the welfare of the Indians to extinguish their title, or it might not procure their session. Under neither contingency would the company have the right to complain.
>
> *A. & P. Rd. v. Mingus,* 165 U. S., 437, 439.

LIKE THE MITCHELL CASE, THE OTHER CASES RELIED UPON BY PLAINTIFF APPEAR TO HAVE BEEN OVERRULED, OR NOT IN POINT.

In *Tarpey v. Madson,* 178 U. S., 215, the Court was construing the grant to the Central Pacific Railway Company, wherein the grant was of lands "not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have *attached,* at the time the line of said road is definitely fixed."

And in the course of that opinion the following language is quoted:

> " 'Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office by which the inchoate right to the land was initiated.' "

But even in this case it would appear that if the facts had shown that Olney had occupied the land prior to the filing of the map of definite location, *with the intent to acquire title,* the decision might have been otherwise, as the following language of the opinion indicates:

> "It is true that there was then no local land office in which those seeking to make preemption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the Supreme Court of the State one of the main grounds for holding that the land did not pass to the railroad company. We agree with that Court fully in its discussion of the general principles involved in the failure of the Government to provide a local land office. The right of one who has actually occupied, with an intent to make a homestead or preemption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent. In many States the statutory provision in respect to suits is that the defendant, on receiving service of summons, must within a certain time file his answer in the office of the clerk of the court. It cannot be doubted, that if, before he is thus called upon to file his answer the office is burned, and the clerk dies, and there is no place or individual at which or with whom his answer can be filed, such accident or omission will not

> defeat his right to make a defense, or give to the plaintiff a right to take judgment by default. Where the accident or omission is not the fault of the party but of the Government, or some official of the government, such accident or omission cannot defeat the right of the individual, and in all that is said in respect to this by the Supreme Court of the State of Utah we fully agree. If Olney was in possession of this tract before October 20, 1868, with a view of entering it as a homestead or preemption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights. But when the office was opened he filed his declaratory statement, and in that he did not suggest that he had been in the occupation of the premises prior to October 20, 1868, but declared that on the 23d of April, 1869, he settled and improved the tract. Assume that such declaration was subject to correction by him, that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or preemption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States."

As stated in the quotation, there was nothing to show that the settler on this land was occupying it with intent to acquire title. Very different is the case at bar, where the Indians settled on the lands with the intention of acquiring them as their reservation.

So the case of *Whitney v. Taylor,* 158 U. S., 85, also involves land within the grant of the Central Pacific Railway Company, and the distinction in construction is pointed out in the opinion on page 94:

> Further, it may be noticed that the granting clause of the Pacific railroad acts differing from similar clauses in other railroad grants, excepts lands to which preemption or homestead "claims" have attached, instead of simply cases of preemption or homestead "rights."

In this case the language first above given from *Tarpey vs. Madsen,* enlarging on the word "attached," is also quoted with approval; nevertheless, it was decided that the tract in question was excepted from the operation of the grant.

Nor can the case of *N. P. R. R. Co. vs. Colburn,* 164 U. S., 383-386, cited by plaintiff, be correctly applied to the case at bar. As pointed out in *Nelson vs. Northern Pacific,* 188 U. S., 132, the land there claimed by it to have been occupied "at the date of definite location was *surveyed* public land, and the good faith of the occupation was not manifest by an entry, or an attempt at entry at any time in the local land office."

In the case at bar, the good faith of these Indians has not been questioned and the land when first occupied by them as a reservation was unsurveyed and was so still when the proclamation of the President was made; and, therefore, it is described in that order by natural objects and not by metes and bounds.

The action of the officials of the Interior and War Departments in securing from General Howard this description by natural objects to be used in the Executive Proclamation shows the "concurrence and approval of the Secretary of War and the Secretary of the Interior," which plaintiff seems to challenge, but which is perfectly apparent from the record.

General Howard sent his telegram to the War Department August 31st, 1880. (Tr. p. 80).

It was transmitted from the War Department with a letter to the Secretary of the Interior September 1, 1880. (Tr. pp. 79-80).

General Howard issued his Field Order No. 8, protecting the land from settlement, on September 3, 1880.

This Order was transmitted by letter to Colonel Wheaton on September 5, 1880. (Tr. p. 79).

In this letter transmitting this Order, occurs the following statement:

"The Secretary of the Interior has asked our cooperation and expressed himself as grateful for promised aid."

On September 7, 1880, the Secretary of the Interior wrote to the Secretary of War, requesting "That General Howard be instructed to forward a description by natural objects of the tract of country which he desired reserved for the protection of said Indians." (Tr. pp. 82-83).

This description—the map (Tr. p. 84) was forwarded by General Howard and transmitted by the Secretary of War to the Secretary of the Interior January 15, 1881.

Within three days thereafter the Executive Order declaring the reservation is proclaimed. (Tr. p. 88).

Still plaintiff questions the concurrent action of the Executive Departments. "There are none so blind as those who *will* not see."

But to return to the case of *Northern Pacific Railroad Company vs. Colburn.* In that case the language of the granting Act seems not to have been closely scrutinized, and it was apparently assumed that the terms were the same as in other Pacific railroad grants, and required the claim to attach to the land by an entry in the land office. This is shown by the words of the opinion, "but frequent decisions of this Court have been to the effect that no preemption or homestead claim attached to a tract until an entry in the land office," and then goes on to quote from the Dunmeyer case the language heretofore given that "of all the words in the English language, this word 'attach' was probably the best that could have been used," etc. Thus the word *attached* is stressed in the opinion, while it nowhere occurs in the granting Act of the Northern Pacific Railroad.

This decision in the Colburn case, as was observed in the dissenting opinion, is "put one side" by the later case of *Nelson vs. Northern Pacific Railway Company,* 188 U. S., 108.

> Ib. p. 119: *"The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed."*
>
> Ib. p. 123: "If it be said that Nelson's claim was that of mere occupancy unattended by formal entry or application for the land, the answer is that that was a condition of things for which

he was not in anywise responsible, and his rights in law were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal record of entry until such survey."

Ib. p. 130: "Being in possession of the land in question at the date of the definite location of the road, with valuable improvements thereon and duly qualified to assert a right thereto under the settlement laws, he had such a right to the land as served to defeat the grant."

To show that the Court deliberately disregarded the Colburn case, the following is quoted from the dissenting opinion:

"At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to anybody that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this Court unanimously held in *Northern Pacific Railroad v. Colburn*, 164 U. S., 383, that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the Court to reconsider its decision, which application was denied

> without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put one side by the assertion that the land there in controversy had been surveyed while in this it had not been."

This Nelson case is cited with approval by this Court in *Trodick vs. Northern Pacific Railway Company,* 164 Fed., 916, where the decision was against the claim of the Railroad Company, and which case was affirmed in *Northern Pacific Railway Company v. Trodick,* 221 U. S., 208, the reasoning of which case fully sustains the claims and rights of the Indians in the case at bar. Plaintiff captiously criticises the Court below for quoting in its opinion pertinent paragraphs from the language of the decisions of this Court and the Supreme Court as to what constitutes "public lands" within the meaning of the Act in question, and finds fault because the cases dealt with the question as of the date of the grant rather than that of the filing of the map of definite location. We submit that no flaw in the reasoning of the Court is pointed out, but if it is more satisfying to plaintiff, we trust it will be noted that the Nelson case and the Trodick case, *supra,* were both "concerned with the question of exceptions from a railroad grant."

Further, the Court will not fail to notice that all the cases cited by plaintiff involve homestead or preemption claims, but the exception in the Act is

not restricted to such alone, but in express terms refers to "other claims or rights."

The grant to the plaintiff was only of lands to which the United States had "full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed."

THE LANDS "WERE RESERVED."

This reservation was established as the result of a convention and by agreement with the Indians on August 18, 1877. The manner in which it was done was in keeping with a recognized method of procedure, which at the time obtained in the Department of the Interior.

In referring to this very question the reprot of the Commissioner of Indian Affairs for 1878, at page 58 (Tr. 67-68), says:

> Indian Reservations are created and their boundaries defined in four different modes:
>
> First: By * * * conventions and agreements with the various tribes.

Furthermore, Inspector Watkins was, by letter of May 7, 1877, particularly directed by the Commissioner of Indian Affairs to gather these Indians upon permanent reservations and in securing results to act with General Howard. (Tp. p. 69).

The cooperation of the Department of the Interior and the War Department is shown throughout the negotiations which resulted in the agreement with the Spokane Indians of August 18, 1877, in their

being placed upon the reservation in November, 1877, and in their being continuously thereafter protected in the possession thereof until the proclamation of the President. (Tp. pp. 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83).

> The action of the Commissioner of Indian Affairs is presumed to be the action of the President, and where the Commissioner ratifies and approves the action of an agent, either before or after it takes effect, his acts are valid, and binding on the Government.
>
> 22 *Cyc.*, 142.

The action of the Secretary of the Interior and the Secretary of War was in legal effect the establishment of a reservation.

32 *Cyc.*, 776.

The evidence introduced at the trial establishes that these Indians had gone upon the reservation in pursuance of the agreement and that in 1879, long prior to the filing of the map of definite location, the said Indians were actually residing on said lands, and had made valuable improvements thereon and were cultivating the same and occupying and claiming them as their reservation. (Tp. pp. 64, 65, 66, 67, 92, 93).

The following excerpts from the opinion of Mr. Justice White, now Chief Justice, rendered in the case of *Spalding v. Chandler,* 160 U. S., at p. 404, are particularly appropos:

> "* * * whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making

of the treaty and acquiesced in by the United States government or whether the selection was made by the government and acquiesced in by the Indians, is immaterial. The clear duty rested upon the government to see that a tract was reserved for the purposes designated in the treaty. *United States v. Carpenter,* 111 U. S., 347-349."

"The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer."

"Private rights could not, without the authority of Congress, be acquired in the tract during the occupancy of the reservation under the treaty, *for the lands in question lost their character as public lands in being set apart or occupied under the treaty,* and became exempt from sale and preemption. *Missouri, Kansas & Texas Railway v. Roberts,* 152 U. S., 114, 116, 118." (Italics inserted).

THE LANDS WERE "OTHERWISE APPROPRIATED."

It is urged that these lands were not reserved by "competent authority." We think otherwise.

But beyond the significance of the word "reserved" alone, there are other words in the Act which, taken in connection with it, make it clear that these lands do not fall within the grant. "Otherwise appropriated" is one term of description, and at the time of filing of the map of definite location these lands were appropriated to the use of the Indians, and were occupied by them. Even though

it were not a final appropriation, it was sufficient to except it from the grant.

N. P. v. Musser, 168 U. S., 608.
Mo. Kansas, etc., R. vs. Roberts, 152 U. S., 114.
Spalding vs. Chandler, 160 U. S., 404.

The action of the Department officials and of the Indians amounted to an appropriation of the lands to a special purpose, being at least such a segregation and withdrawal of said tract from settlement and from the public domain that it was no longer "public land" in that fullest sense of the term required to bring it under the grant.

The action of the War Department, cooperating with the Interior Department by invitation, in directing the armed forces of the Government to prevent intrusion or settlement upon these lands claimed by the Indians, we submit was a more effective segregation and withdrawal of it from the public domain than the mere filing of a notice or order in the Land Office could have been.

If there is no doubt that such notice or order would accomplish the purpose, why in reason should the more notorious and powerful protection of these lands against intrusion by the army be held impotent.

By the action taken, these lands were withdrawn from private entry or appropriation until further action should be taken.

U. S. v. Carpenter, 111 U. S., 347.

"The intent of Congress in all railroad land grants, as has been understod and declared by this Court again and again, is that such grant shall operate

at a fixed time, and *shall take only such lands as at that time are* public lands."

U. S. So. Pac. R. R., 146 U. S., 570.
N. P. R. R. v. Musser L. Co., 168 U. S., 604.
Northern Lumber Co. v. O'Brien, 204 U. S., 199.

"Every tract set apart for special uses is reserved to the government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indians or for other purposes.

This reservation was reserved by an agreement with the Indians. To afterwards transfer the odd sections therein to the Northern Pacific would "involve a gross breach of the public faith." The presumption is conclusive that Congress never meant that lands thus encumbered should pass by the grant.

Congress cannot be supposed to have intended to include land appropriated to another purpose.

This Act discloses no intention to change the long continued practice with respect to tracts set apart for the use of the government or of the Indians.

"If, on examination, there are doubts about the intention or intent of the grant, the government is to receive the benefit of them."

To consider what is excepted, will serve to fix more definitely what is granted. All land "reserved" or "otherwise appropriated" at the time of the filing of the map of definite location are excluded from the grant. The language is broad and comprehensive and unquestionably covers these lands.

Speaking of a similar grant, the Court, in *Leavenworth, etc., R. R. Co. v. U. S.*, 92 U. S., 746, said:

> It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. *The lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent. What ought to be done, has been done.* (Italics inserted).

THESE LANDS WERE NOT "FREE FROM CLAIMS OR RIGHTS."

In this Act occur other words of exception. The land to pass by the grant must be "free from preemption and other claims or rights." Certainly, after the action taken by the agents of the Interior and War Departments, subsequently ratified by the President of the United States and Congress and the occupation of the lands as a de facto reservation by the Indians, it cannot be said that the premises were "free from rights or other claims."

We believe that on the undisputed facts in this case and the law applicable thereto, the rights of these Indians to this reservation are firmly established.

But the language is not simply "free from rights," but "free from claims." Surely the Indians had an existing claim. No one can read all the words of the description which express the exceptions, without

being impressed with the fact that Congress meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term.

That these Indians had a special claim to these lands is too plain to require argument. It was recognized by the Proclamation of the President and ratified by various acts of Congress (Transcript p. 88); it was upheld against the strenuous opposition of the plaintiff by the decision of the Secretary of the Interior (Transcript p. 61). It cannot be questioned now.

A claim as defined by Webster is: "A demand of a right or *supposed right.*" To except these lands from the grant not even an *equitable claim* was required, only the demand of a *supposed right.*

Surely, no one will say that the Indians who, in compliance with the agreement and solemn assurance of Watkins, the duly authorized representative of the President, had gone on these lands as a reservation and claimed them as such ever since November, 1877, were not insisting on a *supposed right,* different from their general right of occupancy. It must be conceded that theirs was an *equitable claim.* If so, as said in the 26th *A. & E. Encyclopaedia*, p. 221:

> The right to acquire land once attached to a public tract is as effective as a grant to segregate the land from the public domain. The tract cannot be otherwise disposed of by the Government, unless the equity is lost. * * * And on the grant passing, it relates back to the initiation of the right, cuting off all intervening claims.

The decisions of the Courts go even further and say that not "a valid claim" nor "an equitable claim" is necessary—only just "a claim." Even an unlawful claim is enough to except it from plaintiff's grant.

In construing this word "claim" in grants similar to the one under consideration, the Supreme Court of the United States has held:

> It was not the intention of Congress to open a controversy between the claimant and the Railroad company as to the validity of the former's claim; it was enough that the claim existed, and the question of the validity was a matter to be settled between the Government and the claimant, in respect to which the railroad company was not permitted to be heard.
>
> *United States v. So. Pac. Rd.,* 146 U. S., 570, 606.

> This section expressly excludes from preemption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be lawful, but submitted them all for adjudication.
>
> *Newhall vs. Sanger,* 92 U. S., 761, 765.

Likewise, Judge Ross, in *United States vs. Southern Pacific Railroad Company,* 76 Fed., 136, said:

> Whether or not valid is immaterial to the question here; for, as has been often decided by the Supreme Court, it is not the validity of such claim, but the fact that it exists at the time of the definite location of the railroad, that excluded the lands in controversy from the category of "public lands," to which alone the company's

grant attached. * * * This view is conclusive as against the contention of the defendant railroad company."

And equally conclusive against the plaintiff railroad company in the case at bar.

The opinion of the lower Court in the case at bar furnishes apt language:

FOR A CONCLUSION.

"In the light of the foregoing decisions it seems manifest that the Spokane Tribe of Indians had a special claim to the lands embraced in this reservation at the time of the definite location of the railroad such as would except them from the operation of the grant to the company. Whether that claim was a valid one, enforceable against the United States, we need not enquire. It is sufficient that the claim existed. The lands had been set apart for the use of the Indians by both the civil and military authorities of the Government; the officers of the Government represented to the Indians that they came among them for the purpose of establishing a reservation, armed with authority from the Secretary of the Interior and the President of the United States; the Indians relied upon these representations, moved onto the reservation, established homes there, and relinquished their more general claim to other public lands in the vicinity. After all this had transpired the Government was bound, in equity and good conscience, to recognize the claim of the

Indians and confirm the acts of its officers and did so at an early opportunity by public proclamation of the President. It is idle, now, to enquire whether these officers had technical authority under the law to establish a reservation. The parties were not dealing on an equal footing A powerful Government was treating with an inferior race, and to repudiate the claim of the Indians at this late day because of the technical rules of law, of which the Indians were totally ignorant, would be an act of perfidy such as the Government has never been guilty of in all its dealings with the numerous tribes of Indians within its borders.

"If the lands were excepted from the operation of the grant at the date of definite location, by reason of the claim of the Indians, they were excepted for all purposes and for all time."

We respectfully submit that the decision of the District Court should be affirmed.

FRANCIS A. GARRECHT,

United States Attorney,

for Defendant in Error.